

JUDGEMENT ENTERED ON OCT 8 1992

1. The debtor filed this petition on March 20, 1991.
2. The Chapter 13 Plan was confirmed on June 4, 1991. The Plan required monthly payments of \$170.00 for 60 months or approximately 30% to unsecured creditors. At the time the Plan was confirmed this would have been a no asset case under Chapter

7. The current status of the Plan indicates that there would be a payout of 24% to the unsecured creditors.

3. On October 9, 1991 the debtor's father died. The debtor received an inheritance under his father's will of approximately \$16,000 in August, 1992.

4. The debtor did not list the inheritance as an asset on his Chapter 13 petition.

5. On September 2, 1992 the Trustee filed this motion to amend the debtor's Plan to include the inheritance and increase the percentage payout to the unsecured creditors.

DISCUSSION

Modifications of Chapter 13 plans are granted regularly due to the debtor's loss of income or employment or some other hardship. It is rare that a debtor seeks to modify the Chapter 13 plan to increase the payout to unsecured creditors, but such an option is contemplated by § 1329(a). This option also extends to the Trustee and unsecured creditors. 11 U.S.C. § 1329(a). Facially, it would seem unjust to, on the one hand, allow the debtor to modify his plan downward upon an unexpected financial loss, but on the other hand, deny the Trustee's request to modify the plan upward upon an unexpected financial gain. Section 1329(a) of the Code clearly provides for post-confirmation modifications to increase or decrease the amount of payments to a class of creditors. In the instant case the court concludes that the upward modification requested by the Trustee should be allowed.

There are three issues that led the court to adopt its holding: 1) whether the inheritance is property of the estate; 2) whether the Trustee has standing to request the modification and the modification is warranted; and, 3) whether res judicata bars a modification of the Chapter 13 Plan.

A. The Inheritance is Property of the Estate.

Whether the inheritance is property of the estate is governed by §§ 541 and 1306 of the Bankruptcy Code. Section 541(a)(5) includes as property of the estate;

Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date --

(A) by bequest, devise, or inheritance.

11 U.S.C. § 541(a)(5). In the present case the debtor's inheritance was acquired more than 180 days after the filing of the Chapter 13 petition, however § 1306 of the Code expands the definition of property of the estate to include "all property of the kinds specified in [§ 541] ... that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title." 11 U.S.C. § 1306(a)(1) (emphasis added). Inheritance is clearly a kind of property specified in § 541 and therefore the debtor's inheritance is property of the Chapter 13 estate. See, In re Koonce, 54 Bankr. 643 (Bankr. D.S.C. 1985) (debtor's acquisition of 1.3 million dollars in state lottery almost four years after filing became property of the estate pursuant to § 1306(a)(1)).

B. The Trustee Has Authority to Seek § 1329(a) Modification and the Modification is Warranted.

Section 1329(a) provides for post-confirmation modification of a Chapter 13 plan "upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to -- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan." 11 U.S.C. § 1329(a). The provision is "intended to carry the ability-to-pay standard forward to any modifications of the plan, allowing upward or downward adjustment of plan payments in response to changes in the debtor's circumstances which substantially affect the ability to make future payments." 5 Collier on Bankruptcy, P. 1329.01[b] at 1329-5 (15th ed. 1992). Thus, the Code contemplates the Trustee's motion before the court in this proceeding.

The modification provision does not delineate the circumstances that would justify such a modification, however, "it is well-settled that a substantial change in the debtor's financial condition after confirmation may warrant a change in the level of payments." Arnold v. Weast (In re Arnold), 869 F.2d 240, 241 (4th Cir. 1989) (citing numerous courts that have interpreted the standard for granting a modification). In the present case the debtor has received approximately \$16,000 from his father's estate. The debtor listed his monthly income after taxes in his schedules at \$1,220.79. The \$16,000 inheritance is certainly a substantial change in the debtor's financial condition justifying a modification of the Chapter 13 Plan.

C. Res Judicata Does Not Bar the Modification.

The doctrine of res judicata may bar modifications to a Chapter 13 plan to increase the monthly payments when the changes in the debtor's financial situation could have been anticipated at the time the debtor's plan was confirmed. Arnold, 869 F.2d at 243; In re Fitak, 121 Bankr. 224, 226 (S.D. Ohio E.D. 1990); but, see, In re Perkins, 111 Bankr. 671, 673 (Bankr. M.D. Tenn. 1990) ("[c]hanged circumstances, unanticipated or otherwise, is not imposed by the Code as a threshold barrier to access to modification under § 1329"). The standard used to determine whether the change in circumstances was unanticipated is "whether a debtor's altered financial circumstances could have been reasonably anticipated at the time of confirmation by the parties seeking modification." Arnold, 869 F.2d at 243 (citing, In re Fitak, 92 Bankr. 243, 250 (Bankr. S.D. Ohio 1988) (emphasis in original)).

In the present case the debtor's receipt of an inheritance was unanticipated at the time of confirmation. The debtor testified that his father was diagnosed with fibrosis of the lungs as of the confirmation date, however, there was no indication that his father's death was imminent. Additionally, the debtor testified that although he knew his father had a will, he did not know the substantive terms of the will. The debtor did not list the inheritance as an asset in his schedules because he was not aware that he was a beneficiary under his father's will. Upon these facts the court finds that the debtor's receipt of his inheritance was not reasonably anticipated by the Trustee at the

time of confirmation. Accordingly, res judicata presents no bar to the modification of the debtor's Plan.

CONCLUSION

Post-confirmation modification to increase the amount paid to a particular class of creditors is expressly set forth in § 1329(a) of the Code. Trustees, as well as debtors and unsecured creditors have standing to request such modifications. Two limitations to the requests are: 1) that the change in financial circumstances be substantial to justify the modification; and, 2) that the changed circumstances are not those that could have been anticipated at the time the Chapter 13 plan was confirmed. The facts in the present case indicate that the debtor's receipt of approximately \$16,000 as an inheritance is a substantial change in his ability to pay his creditors and that the Trustee could not have reasonably anticipated that the debtor would receive such an inheritance. Accordingly, the Trustee's request for modification should be allowed.

It appears that the court has insufficient information regarding the exact amount of the inheritance and the disposition of the inheritance. In light of the situation the court **ORDERS** the following:

1. The Trustee's Motion to Modify Plan is hereby **ALLOWED**;
2. The debtor shall, within thirty (30) days of the date of this Order, provide the Trustee with an accounting

for the entire amount of the inheritance and any disposition of the inheritance; and,

3. Based upon the information from the debtor, the Trustee shall prepare and notice for hearing the modification of the Chapter 13 Plan needed to reflect the addition of the inheritance to the debtor's Plan.

This the ____ day of October, 1992.

George R. Hodges
United States Bankruptcy Judge